MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SACRAMENTO, SAN DIEGO,
DENVER, NORTHERN VIRGINIA,
WASHINGTON, D.C.

TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

232031

March 12, 2012

Writer's Direct Contact
(202) 887-1519
DMeyer@mofo.com

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: ***Union Pacific R.R. – Petition for Declaratory Order – Finance Docket No. 35504***

Dear Ms. Brown:

Enclosed for electronic filing in the above-referenced docket is the Reply Evidence and Argument of Norfolk Southern Railway Company.

Thank you for your assistance.

Sincerely,

David L. Meyer

Attachment

cc (with attachment): David L. Coleman, Esq.
John M. Scheib, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

REPLY EVIDENCE AND COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Anand Viswanathan
Morrison & Foerster, LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: March 12, 2012

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

REPLY EVIDENCE AND COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company ("NS") submits this Reply Evidence and Comments in response to the comments of various parties who have challenged the reasonableness of the UP tariff provisions at issue in this proceeding, which provide for indemnification under certain circumstances for liabilities associated with the release of TIH commodities that shippers demand be transported on UP's rail network.

I. INTRODUCTION

Commenters who challenge the reasonableness of UP's tariff fail to come to grips with the fundamental issues at stake in this proceeding. The Board's conclusion that the common carrier obligation should require railroads to transport TIH chemicals on their networks regardless of the level of risk, and regardless of whether there is any true transportation need, makes it imperative that the Board's regulatory framework provide flexibility for railroads to take steps to address the attendant risks.

Two central facts are by now well established: the common carrier obligation as presently interpreted compels railroads to transport TIH, and moving TIH chemicals entails extraordinary risks. In this context, the Board's regulation should accommodate measured efforts by railroads to achieve three interrelated goals.

- *First and foremost*, railroads should have discretion to adopt appropriate operational rules and practices aimed at ensuring that the TIH chemicals they must transport are handled in a safe and secure manner, so that risks are reduced to the extent feasible.[1]
- *Second*, railroads should be entitled to compensation for the risks posed by their obligation to transport TIH chemicals, including the risk that extraordinary liabilities will be imposed on railroads in the event of a TIH release.
- *Third*, railroads should have latitude to establish incentives for the shippers who demand TIH transportation to consider the true externality costs of their shipping decisions – and in particular to evaluate the availability of lower-risk options, such as shorter or different transportation routes or alteration of their supply chains to substitute lower-risk chemicals.

Accommodating railroad efforts to achieve these goals will not open the door to any abuse of market power or exploitation of shippers. Railroads will continue to ship TIH chemicals upon request, in accord with the Board's determination regarding their common carrier obligation to do so. And the Board will at all times retain its power to adjudicate the reasonableness of carrier rates where market dominance is present.

On the other hand, failing to provide railroads with flexibility to take these steps will preclude reasonable and common sense measures aimed at reducing societal risks and avoiding uncompensated liabilities. Commenters who assert that requiring indemnification is

---

[1] This issue is presently being considered by the Board in Finance Docket No. 35517. *See* Reply Comments of Norfolk Southern Ry., Finance Docket No. 35517 (filed Feb 27, 2012) ("NS FD 35517 Reply Comments") at 9-12. NS incorporates by reference the exhibits to its Reply Comments in FD 35517.

unreasonable desire to place the risks of their shipping decisions entirely on the railroads. They would hold railroads hostage to the obligation to transport deadly TIH chemicals without acknowledging the railroads' fundamental and entirely reasonable need to ensure that the interests of safety and security are addressed. The Board should reject this self-serving position and confirm that railroads may reasonably require indemnification for TIH-related liabilities.

II. THE OPPONENTS' THRESHOLD OBJECTIONS TO THE DECLARATION UP SEEKS ARE WITHOUT MERIT

Opponents attempt to reargue points they made previously when they opposed the commencement of this proceeding.[2] They also suggest that UP's proposed tariff is not reasonable because of its specific wording or interpretive issues.[3] Such arguments should not deter the Board from declaring the reasonableness of the indemnification approach UP has taken.

A. A Board Finding of Reasonableness Would Not Create Uncertainty

The American Chemistry Council and other groups (collectively "ACC") suggest (Opening at 2-5) that a Board determination that UP's tariff provisions are reasonable would create uncertainty. This objection is a rehash of arguments made against the commencement of this proceeding, and in any event it should not be taken seriously. ACC appears to be interested in certainty only to the extent it benefits its members. TIH shippers, of course, benefit so long as they retain the ability to assert, without contradiction by any dispositive

---

2 *E.g.*, Joint Opening Comments of the American Chemistry Council, *et al.*, (filed Jan. 25, 2012) ("ACC Opening") at 2-5.

3 *E.g.*, ACC Opening at 5-7; Opening Comments of Dyno Nobel Inc. (filed Jan. 25, 2012) ("Dyno Nobel Opening") at 7-11; Opening Argument and Evidence of Olin Corp. (filed Jan. 25, 2012) ("Olin Opening") at 12-15; Opening Evidence and Argument of CF Industries, Inc. (filed Jan. 25, 2012) ("CF Industries Opening") at 10-14.

Board decision, that a proposed indemnity would be "unreasonable." The intensity of the opposition to UP's tariff shows that any railroad that might seek to include an indemnification provision in its tariff would face a costly legal battle in the absence of a Board ruling confirming the reasonableness of such provisions in the context of TIH transportation. A Board ruling on the reasonableness of UP's tariff will remove this cloud of uncertainty.

Such a ruling would be constructive even if there might remain some uncertainty surrounding the enforcement of the indemnification provisions in state court, as ACC suggests (Opening at 3). Today there would be two potential sources of uncertainty if a carrier sought to enforce an indemnity in state court: (a) the threshold question, subject to the primary jurisdiction of the Board, whether the indemnity provision is reasonable under ICCTA, and (b) the question whether in a particular case an indemnity provision would be found to be unenforceable as a matter of state law, even if the Board has ruled it to be reasonable under ICCTA.[4] The first category of uncertainty would be removed entirely by a Board ruling here,[5] while the second would at worst be unaffected. The enforceability of an indemnity in a judicial proceeding would certainly not be rendered any less likely by a Board determination that such a provision is reasonable under ICCTA.

A related objection expressed by Olin (Opening at 21-22) is that a ruling in favor of UP will somehow distort how contracts are negotiated. NS offers no comment on how other railroads will approach the contracting process, nor will NS disclose how it might do so. It is clear, however, that any effect on the contracting process is irrelevant to the issue before the

---

[4] As discussed in Section V below, that uncertainty is overstated. The indemnity UP seeks would plainly be enforceable under governing legal principles.

[5] Such a ruling would have the further benefit of avoiding the need for wasteful and time-consuming referrals to the Board seeking guidance on the reasonableness of indemnity provisions.

Board: whether UP's tariff is reasonable. If that tariff is reasonable, there is no reason why it should not be useable by UP (if UP chooses) as a default provision in the event that it is unable to agree to different contractual terms with its customers.[6]

B. The Board Should Provide Guidance that Is Not Linked Solely to the Specific Language of UP's Tariff

Concerns expressed by some opponents about specific language in UP's tariff should not deter the Board from issuing a declaratory order confirming the reasonableness of indemnity provisions that exclude railroad negligence. As NS has previously noted, it has no stake in the specific language of UP's tariff provision, and leaves to UP to respond to claims that that language is ambiguous or overbroad.[7] However, NS does have a keen interest in the Board confirming the reasonableness of indemnification provisions along the lines of what NS understands to be the intended scope of UP's proposal: *i.e.*, indemnification for railroad liability associated with the transportation of TIH commodities that is not caused by the railroad's own negligent conduct.

III. RAILROADS ARE EXPOSED TO SIGNIFICANT LIABILITY RISKS WHEN THEY TRANSPORT TIH COMMODITIES

At this point in the Board's extensive consideration of issues associated with TIH transportation, there is no longer room for debate that transporting TIH commodities entails extraordinary risks even when all realistically feasible precautions are taken. The record in this docket is replete with evidence of the extraordinary magnitude of those risks, which flow

---

[6] In fact, Olin's position appears disingenuous. Its insistence that any indemnification provision is unreasonable is no less an "obstacle" (under Olin's reasoning) to the parties working out efficient solutions through contractual negotiations.

[7] *See, e.g.*, ACC Opening at 5-7, Dyno Nobel Opening at 7-11, Olin Opening at 12-15.

directly from the intrinsic nature of the chemicals being transported and their lethal effects if released.[8]

In the decade since the terror attacks of September 11, 2001, NS has developed a heightened awareness of the extraordinary risks posed by TIH transportation. That decade witnessed terror attacks outside the United States that targeted railroad infrastructure and terrorist plans to target railroads within the United States, where TIH-laden tank cars passing through our Nation's cities present an attractive target for malefactors seeking convenient access to weapons of mass destruction.[9] For NS, the past decade also saw the unfortunate accident in Graniteville, South Carolina, which illustrated how a TIH release (whatever the cause) could cause significant loss of life and significant liability even when it takes place in a relatively unpopulated area. Independent analysts have estimated the potential liability exposure in the billions of dollars. *See* CP Opening at 3 & Att. 2.

---

[8] *See, e.g.*, Opening Evidence and Argument of Norfolk Southern Ry. (filed Jan. 25, 2012) ("NS Opening") at 13 n.5; Comments of Canadian Pacific Ry. (filed Jan. 25, 2012) ("CP Opening") at 9; Opening Argument and Evidence of Union Pacific Railroad Co. (filed Jan. 25, 2012) ("UP Opening"), Duren V.S. at 3-5; *see generally* Written Testimony of the Association of American Railroads, STB Ex Parte No 677 (Sub-No 1) (filed July 10, 2008) at 14-20. Underscoring the intrinsically hazardous nature of TIH chemicals is the fact that many of them have been used as weapons in various wars, including World War I and more recently the Bosnian war. *See* NS FD 35517 Reply Comments at 4-7.

[9] Concern about this is not a function of railroad paranoia. The threat has captured the attention of the Council on Foreign Relations, which concludes:

> "High profile terrorist attacks on rail systems in Madrid, London, and Mumbai provide troubling illustration to persistent warnings that the U.S. public transportation system is a vulnerable target for terrorists. But passenger rail is not the only, and perhaps not even the gravest concern. *Much of the 160,000 miles of railroad track in the United States transports freight, including highly toxic chemicals. These shipments often have minimal security, even though they pass through populated areas, endangering thousands of lives.*"

"*Rail Security and the Terrorist Threat*," Council on Foreign Relations Backgrounder (Mar 12, 2007) (emphasis added) (Exhibit 1 hereto). There is concrete evidence of terrorist plans to attack railroad targets in the United States. For example, evidence gathered at the scene of Osama bin Laden's capture indicated that al-Qaeda had such plans to attack U. S. freight trains. *See* BBC News, "Osama Bin Laden 'Planned 9/11 Anniversary Train Attack'" (May 6, 2011), *available at* http://www.bbc.co.uk/news/world-us-canada-13304809 (Exhibit 2 hereto).

No commenter appears to dispute the magnitude of the potential harm from a TIH release in a populated area. Instead, they suggest that railroads should disregard those risks because the releases that have occurred on the U.S. rail network thus far have not resulted in mass casualties or bankrupted the handling railroad.[10] This is fortunate indeed, but railroads should not have to wait for a true disaster before taking action. An unrealized risk is still a risk: for example, the latent defects in the bridge across Scotland's Firth of Tay had yet to claim the lives of railroad passengers until 75 perished when the structure collapsed during an 1879 storm.[11] The evidence of the extraordinary risks of catastrophic outcomes from a TIH release is compelling and cannot in good conscience be ignored.

Nor is it relevant that some of the railroad accidents that resulted in releases of TIH chemicals were caused by railroad negligence, as some commenters have argued. *See, e.g.*, CF Industries Opening at 7-10. Whatever their causes, those accidents powerfully illustrate the lethal consequences of any TIH release that flow from the intrinsically poisonous nature of the product being transported. Moreover, there is ample evidence supporting the common sense conclusion that there are, unfortunately, numerous rail accidents that are outside the reasonable ability of railroads to prevent (as when motorists drive into the sides of trains at grade crossings, or bridges are washed out by flash floods), and that those accidents are every bit as capable of causing a catastrophic TIH release. *See, e.g.*, CP Opening at 6; NS Opening at 7, 21-23.

---

10 *See* Opening Comments of Occidental Chemical Corp. (filed Jan. 25, 2012) ("OxyChem Opening") at 3-4.

11 *See* openlearn.open.ac.uk/mod/oucontent/view.php?id=3978930&section=3.1. The same could be said of the thousands killed in the devastating attack on the World Trade Center in 2001 or the chemical release in Bhopal in 1984.

IV. INDEMNITY PROVISIONS DO NOT CIRCUMVENT THE RAILROADS' COMMON CARRIER OBLIGATIONS

Several commenters seek to deflect attention from the actual tariff provisions at issue in this proceeding by arguing about matters outside the scope of this proceeding. They remind the Board that UP has previously sought to decline transportation of TIH commodities, and that other railroads have, at least since September 11, 2001, observed that the revenues available from TIH transportation do not compensate for the heightened risks associated with transporting TIH chemicals – including the immeasurable liabilities that might be imposed upon them in the event of a terrorist attack. These commenters urge the Board to reject UP's tariff as an effort to shirk the railroads' common carrier obligations. Olin Opening at 6-7; ACC Opening at 7-10. And they express concern about additional steps railroads might seek to take if the Board rules in favor of UP here. ACC Opening at 7-10; Olin Opening at 19-21; Opening Comments of Canexus Chemicals Canada, L.P. (filed Jan. 25, 2012) ("Canexus Opening") at 5. Such concerns are as irrelevant as they are groundless, and the Board should not be distracted by them.

A. Past Debate About the Parameters of the Common Carrier Obligation Has No Bearing on the Reasonableness of the Tariff Provisions at Issue Here

The fact that UP has in the past litigated the question whether it was obligated to transport TIH chemicals when safer transportation or supply chain options were available does not alter the reasonableness of UP's indemnification provisions.

First, under longstanding Board precedent, the test of reasonableness turns on the purpose and effect *of the practice at issue in the proceeding*, not other steps that the railroad might have sought to take. An unreasonable practices proceeding is an adjudicative one necessarily confined to the controversy presented for resolution. *West Point Relocation, Inc.*

& Eli Cohen – Petition for Declaratory Order, STB Finance Docket No. 35290 (served Oct. 29, 2010) at 7 n.18 ("The agency has long addressed the reasonableness of particular tariff provisions in adjudications."); 5 U.S.C. § 554. There is no legal basis for imposing any form of "strict[] scrutin[y]" (Olin Opening at 7) in considering the reasonableness of a particular set of tariff provisions. The legality of the tariff provision or other practice rises or falls based on its reasonableness under the circumstances. *See, e.g., WTL Rail Corporation Petition for Declaratory Order & Interim Relief,* STB Docket No. 42092 (served Feb. 17, 2006) at 6 ("whether a particular practice is unreasonable" turns on "fact-specific inquiry to a case-by-case analysis"); *Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.,* STB Docket No. 42068 (served Apr. 12, 2004) ("Whether a particular practice is unreasonable typically turns on the particular facts."). The fact that the Board has rejected *other* measures aimed at addressing the risks posed by TIH transportation has no bearing on this question.

Second, contrary to the assertions of some commenters that requiring indemnification is an effort to avoid the common carrier obligation (Olin Opening at 6-7; ACC at 7-10), indemnification does not stand in the way of any shipper's demand for rail service. The Board is not being asked to revisit its conclusion that the common carrier obligation mandates that railroads provide such transportation if shippers demand it. *See Union Pacific R.R. — Petition for Declaratory Order*, STB Finance Docket No. 35219 (served June 11, 2009)). To the contrary, UP's tariff would allow any shipper to make the choice to insist that railroads transport TIH chemicals from any origin to any destination, so long as the shipper

provided a reasonable indemnity.[12] Indemnification imposes no barrier to any shipper's request for transportation because no shipper is *unable* to provide an indemnity. To be sure, indemnification may result in shippers declining to ship TIH chemicals in some circumstances, but this would only be because they conclude that the risks associated with those shipments outweigh the economic benefits. In that case, indemnification would have served the public interest in achieving an efficient level of safety and security.

It bears emphasis that, although UP and other railroads continue to have views about when and where mandatory railroad transportation of TIH chemicals entails risks that are excessive in light of available supply chain and transportation alternatives,[13] indemnification does not give railroads any ability to dictate when and where TIH will be shipped. UP's tariff is blind to whether there are alternatives for particular TIH shipments. Allowing for reasonable indemnification merely gives shippers and their customers incentives to internalize the risks and make more sensible shipping and supply-chain decisions.

Third, were past efforts to address the risks of TIH transportation relevant at all in this proceeding, those efforts *would strongly support* the reasonableness of UP's indemnification provisions. Those efforts reflect the sincerity of railroads' longstanding concerns – made more acute by the terrorist attacks of September 11, 2001, and subsequent attacks against railroads around the world – about the safety and security of such TIH transportation, and the railroads' belief that the revenues available from such transportation do not fully compensate

---

[12] Comments that emphasize the importance of TIH commodities to American industry are beside the point. (Olin Opening at 5-6; CF Industries Opening at 14; Canexus Opening at 5). Railroads are not refusing to handle any shipments if shippers conclude that use of those chemicals, and transportation of them, is sufficiently valuable to bear the risks associated with that transportation.

[13] In point of fact, the record is full of evidence that in at least some cases – and NS believes many – TIH shipments move by rail, and move long distances, unnecessarily. *See* NS Opening at 21-23; UP Opening at 16-20.

for the extraordinary risks. Far from evincing a desire to exploit any supposed market dominance,[14] these efforts show the railroads taking responsible steps to address a real problem. Once the Board concluded that railroads would not have the ability to decide when and where to transport TIH chemicals, it was entirely appropriate and reasonable for them to seek to address those risks in other ways. Applying heightened scrutiny here would inappropriately penalize UP – and in the process all other railroads – for UP having taken the first step to address very real risks.

B. This Proceeding Is About Indemnification, Not Other Steps Railroads Might Take to Address TIH Transportation Risks

The Board should not be distracted by objections to UP's tariff predicated on the concern that railroads will seek to establish *other kinds of* tariff provisions if the Board finds indemnification to be reasonable. These commenters fear a so-called "parade of horribles" that would ensue if the Board rules in favor of UP (ACC Opening at 7-10; *see also* Olin Opening at 6-7). But this proceeding addresses only the question of the reasonableness of UP's *indemnification provision*. Other potential provisions are not before the Board, and might never be proposed. If they were proposed, their reasonableness would be judged in a future proceeding, not this one.

V. OBJECTIONS TO THE LEGALITY OF INDEMNIFICATION UNDER STATE OR FEDERAL LAW ARE WITHOUT MERIT

Several commenters argue that UP's tariff provisions are unreasonable because the indemnification they require would conflict with state or federal principles of tort liability. Such arguments should be rejected for the threshold reason that any such determinations are for the courts, not the Board. The only question for the Board is whether requiring

---

[14] Because a railroad would earn no revenues from a shipment it declines to transport, such a decision can only be explained by the railroad's belief that the shipment entails unnecessary or uncompensated risk.

indemnification is an unreasonable practice under ICCTA. Nonetheless, suggestions that indemnification conflicts with other sources of federal or state law are without merit.

A. UP's Indemnification Provisions Do Not Usurp State or Federal Authority to Determine When TIH Releases Should Give Rise to Tort Liability

Contrary to some commenters' contentions,[15] the indemnification provisions at issue will not interfere with any state's authority to design its regime of tort liability. Quite simply, indemnification will not affect any third party's ability to recover under state tort law from a railroad involved in a TIH release. It would merely require the indemnitor to make the railroad whole for liabilities within the scope of the indemnity. For the same reason, there is no conflict with Congress' supposed intentions in amending 49 U.S.C. § 20106, as CF Industries suggests (Opening at 2-4). No third party injured by a TIH release will be barred from recovering for his or her loss as a result of an indemnity.

Moreover, the indemnification at issue in this proceeding is entirely consistent with state legal principles governing the enforceability of indemnification provisions. UP does not seek indemnification for its own negligence,[16] and accordingly its tariff falls securely within the range of indemnification provisions that are routinely enforced. Indemnification provisions are routine and widely used (*see, e.g.*, NS Opening at 25-27). Indemnification is generally treated by the courts as providing a sound and fully enforceable means of allocating risks for parties in a commercial relationship. Even "indemnity agreements to indemnify against claims and losses resulting from the indemnitee's own negligence are enforceable contracts." *Snohomish County Public Transportation Benefit Area Corp., dba Community*

---

15 OxyChem at 5-6; Olin Opening at 17-19; CF Industries Opening at 4-5.

16 See UP Opening at 4-7; NS Opening at 16-17.

Transit, v. Firstgroup America, Inc., dba First Transit, No. 83795-3 (Wash. 2012)[17] (*quoting McDowell v. Austin Co,* 105 Wn.2d 48, 53-54, 710 P.2d 192 (1985)) (reversing decision declining to enforce indemnity). Even the cases relied upon by UP's opponents confirm that indemnities covering a party's own negligent acts will be enforced. *See, e.g., Kansas City Power & Light Co. v. United Telephone Co. of Kansas Inc.*, 458 F.2d 177, 179 (10th Cir. 1972).

States have refused enforcement of indemnification provisions on public policy grounds only in extreme circumstances not present here, such as when the provisions shield a tortfeasor from its own willful or grossly negligent conduct. *See, e.g*, 15-85 Corbin on Contracts § 85.18 ("Courts do not enforce agreements to exempt parties from tort liability if the liability results from that party's own gross negligence, recklessness, or intentional conduct."); *id.* § 85.17 ("[P]arties cannot contract for indemnity for intentional or willful acts. . . . Generally, courts agree that contracts of insurance purporting to indemnify against intentional or willful acts of the insured are contrary to public policy and unenforceable . . . ."); Restatement (Second) of Contracts § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."); Prosser and Keeton on Torts, § 68, at 482-84 (5th ed. 1984); *see also Wolf v. Ford*, 644 A.2d 522, 531 (Md. 1994); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1370-71 (N.Y. 1992); *Pippin v. M.A. Hauser Enters., Inc.*, 676 N.E.2d 932, 936 (Ohio 1996).[18] The indemnification at issue here raises no comparable policy concerns.

---

[17] *Available at* http://www.courts.wa.gov/opinions/pdf/837953.opn.pdf.

[18] *Cf. also Application of the National Railroad Passenger Corp. under 49 U.S.C. 24309(a) – Springfield Terminal Ry., Boston & Maine Corp. & Portland Terminal Co.*, 3 S.T.B. 157, 162 (1998) ("We will not require Amtrak to reimburse Guilford for damages due to Guilford's gross negligence or willful and wanton misconduct.").

B. Tariff-Based Indemnification Would Not Be Unenforceable as a "Contract of Adhesion"

Nor is there any merit to the suggestion of some commenters in this proceeding that a tariff-based indemnity would be unenforceable as a "contract of adhesion." *See, e.g.*, ACC Opening at 10; OxyChem Opening at 5-6 & n.12; Olin Opening at 18 n.47. This argument is truly ironic, given that the only real "adhesion" is the shipper's demand that the railroad provide transportation of TIH chemicals. Railroads are not free to decline such shipments, whereas no federal law or regulation requires a shipper to manufacture or sell TIH chemicals and have those chemicals transported for many miles, exposing population centers to untold risks. *See* NS FD 35517 Reply Comments, at 7-8.

Moreover, the law is well established that a shipper may not avoid enforcement of a railroad tariff by characterizing it as a "contract of adhesion." Although railroad tariffs are enforceable under state contract law, they are not subject to reformation by state court in the manner of other contracts.[19] If a shipper seeks to avoid enforcement of an unreasonable provision of a tariff, the shipper's recourse is to the Board. Provisions of railroad tariffs that the Board has determined to be reasonable are enforceable as a matter of law regardless whether the shipper has effective transportation options. *See, e.g., Louis. & Nash. R.R. Co. v.*

---

[19] *See, e.g., W. Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982) ("There is no judicial power of equitable reformation of tariffs as of ordinary contracts. . . . [G]eneral precepts of contract construction . . . do not apply to a tariff unless it is ambiguous. If it is ambiguous, it should be construed like any other contract. But if it is unambiguous the parties are bound by its terms and the aids of construction are irrelevant."); *CF Industries. G.M.W., Inc. v. Certified Parts Corp.*, 400 N.W.2d 512, 513 (Wis. 1986) ("The existence of a contract inconsistent with a filed ICC tariff and the carrier's intentional or negligent failure to file the contracted rate with the ICC are not relevant. Equitable defenses are not available to shippers faced with undercharge collection actions brought by common carriers.").

Maxwell, 237 U.S. 94, 97 (1915). A shipper faced with a reasonable tariff must either accept its provisions or decline to ship.[20]

Even if one imagined a court applying equitable principles to enforcement of railroad tariff provisions, those principles would not render an indemnity unenforceable as a contract of adhesion. First, as the Supreme Court has explained, "contracts of adhesion" are not unlawful; rather they are merely scrutinized for their "reasonableness." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) ("The common law, recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness."). The Board's determination of reasonableness in this proceeding would equally determine that there is no obstacle to enforcement.

Second, the cases cited by ACC in support of its claims of unenforceability involved provisions that relieved parties of liabilities arising from their own negligence. *See, e.g.*, *Valhal Corp v. Sullivan Associates. Inc.*, 44 F.3d 195, 202 (3rd Cir. 1995) (dicta addressing indemnification or exculpation clauses for "one's liability for one's own negligence"); *Speedway Superamerica LLC v. Erwin*, 250 S.W.3d 339, 341-42 (Ky. App. 2008); *Del Raso v. United States*, 244 F.3d 567, 569-70 (7th Cir. 2001) (dicta regarding state law disfavoring "contracts releasing parties from liability for their future negligence"). As noted, UP's indemnity would not apply to liabilities caused by the railroad's negligence.

---

[20] *Cf. Louisville & N. R. Co. v. Dickerson*, 191 F. 705, 709-10 (6th Cir. 1911) ("The cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law."); *Norfolk & W. Ry. Co. v. B. I. Holser and Co.*, 466 F. Supp. 885, 890 (N.D. Ind. 1979) ("[T]ariffs, when properly published, have the force and effect of law.").

Third, as these commenters acknowledge, the concept of "adhesion" turns on the inequality of the parties' relative bargaining power.[21] But courts demand a high degree of inequality for a finding of adhesion, as between a major corporation and a relatively helpless individual consumer. The cases cited by opponents involved situations where corporations were seeking to enforce indemnity provisions *against individuals*. *See Speedway Superamerica*, 250 S.W.3d at 342 (refusing to enforce indemnification provision as against public policy because the indemnitor had an eighth grade education and because "it [wa]s difficult to see any benefit [the indemnitor] received" under the contract); *Moxley*, 801 F. Supp. 2d at 604-05 (one-sided attorney fee shifting provision in a consumer loan agreement that obligated a borrower to pay legal fees was void as against public policy). In this proceeding, by contrast, large corporations are seeking *to shield themselves* from enforcement of an indemnity. The chemical shippers have significant commercial leverage; they are sophisticated manufacturers of poisonous chemicals who, by virtue of the common carrier obligation, are able to make demands for transportation that no railroad may refuse.

VI. INDEMNIFICATION WILL NOT REDUCE THE SAFETY OF RAIL TRANSPORTATION OF TIH COMMODITIES

Several commenters object to the concept of indemnification as bad public policy because it will reduce the incentives that railroads have today to make appropriate decisions that reduce the level of risk. ACC Opening at 12; Dyno Nobel Opening, Rudolph V.S. at 5; Olin Opening at 16-17; CF Industries Opening at 6-10, 15; Canexus Opening at 3. These arguments are misguided and ultimately demonstrate why it is so important that railroads

---

[21] ACC Opening at 10. Such inequality was a key factor in each of the cited cases. *See Speedway Superamerica LLC v. Erwin*, 250 S.W.3d 339, 342 (Ky. App. 2008); *Valhal Corp v. Sullivan Associates. Inc.*, 44 F.3d 195, 202-04 (3rd Cir. 1995); *Del Raso v. United States*, 244 F.3d 567, 569-70 (7th Cir. 2001); *Kan. City Power & Light Co. v. United Telephone Co. of Kan.*, 458 F.2d 177, 179 (10th Cir. 1972); *Moxley v. Pfundstein*, 801 F. Supp. 2d 598, 604-05 (N.D. Ohio 2011).

have the flexibility to require indemnification. Ironically, some of the very same commenters object in another pending Board proceeding to railroads taking measures and making decisions to reduce the level of risk from TIH shipments.[22]

The commenters here emphasize the "control" (*e.g.*, CF Industries Opening at 12) railroads have over the movement of TIH-laden tank cars and contend that public safety therefore demands that railroads have incentives to take safety precautions. This argument, however, focuses narrowly and myopically on the actual movement of the TIH-laden railcar. There is no question that shippers and railroads must both take safety precautions in connection with that movement. But the commenters completely ignore that the shippers alone (along with their customers) have control over the decisions whether and where to ship TIH chemicals in the first place. Exactly the same argument about the need for incentives to take appropriate levels of care applies with equal if not greater force to that decision-making, providing a key justification for the indemnity that UP seeks.

As UP, NS and others have demonstrated, shippers and their customers have unfettered "control" (as a result of the common carrier obligation) over the decision whether to ship those chemicals by rail, and how far to send them – decisions that directly affect the level of risk society will bear. NS Opening at 19-25; UP Opening at 18-23. A seller's choice to ship TIH materials over a long distance to a particular customer, instead of arranging for that customer to obtain the product through a swap agreement with a nearby producer, for example, generates unnecessary risks. Likewise, a customer's decision to buy TIH materials from a seller located thousands of miles away instead of nearby creates risks that currently

---

[22] *See, e.g.*, Reply Evidence and Argument on behalf of American Chemistry Council, *et al.*, Finance Docket No 35517 (filed Feb. 27, 2012); CF Industries, Inc.'s Reply Argument, Finance Docket No 35517 (filed Feb. 27, 2012).

are not being internalized by TIH shippers. And the need to transport these materials in the first place is determined by the choice of users to purchase them instead of available alternatives that are safer to transport. These sorts of choices by shippers and their customers dictate both the total volume of TIH commodities railroads must transport and the intensity and scope (in terms of car-miles and route densities) of this dangerous transportation activity. NS Opening at 21-22. Shippers should be incentivized to take these very real risks into account.

As for the railroads' transportation-related decisions, contrary to the objections of some commenters, indemnification will not lead railroads to handle TIH commodities with less care. As NS explained in its Opening Argument, railroads will continue to have extraordinary incentives to operate their networks in a manner designed to avoid TIH releases. Railroads would remain subject to extensive federal safety regulations. NS Opening at 15. They would continue to face risks of uncompensated liabilities in the event of a TIH release because juries may conclude that the railroad was negligent (rendering any shipper indemnity inapplicable) or the shipper may have inadequate financial resources to fully compensate the railroad. *Id.* at 16-17. And, even if indemnification were available, it could not compensate for many of the adverse consequences of a TIH-related calamity, including the killing and maiming of the railroads' own employees and nearby residents, disruption to the railroad's network and damage to its reputation, as well as the political and regulatory backlash that would inevitably flow from a TIH-related catastrophe on the railroad's system. *Id.* at 16.

VII. INDEMNIFICATION WOULD NOT YIELD A "WINDFALL"

A final set of challenges to indemnification contends that it somehow creates a windfall for the railroads that must transport TIH commodities. This claim is wrong as a

matter of fact, because the revenues available from the transportation of TIH commodities do not come close to compensating for the costs and extreme risks associated with that transportation. But it is also misplaced in this proceeding, since any claim that railroads are already receiving compensation for the risks for which they seek indemnification involves a challenge to the reasonableness of the *rates* that the railroads would charge if and when they insistent on such indemnification. No such claim is ripe in this proceeding.

A. Indemnification Would Not Result in "Double Recovery"

OxyChem and other commenters contend that, if indemnification were permitted, railroads would be able to recover liability risks twice, once though the freight rate and yet again through indemnity. *See* OxyChem Opening at 6. This claim is meritless.

First, at present levels, rates charged for TIH transportation *do not* fully reflect the risks posed by TIH transportation. *See* NS Opening at 18 & n.14.

Second, to the extent shippers may think that rail rates would be excessive if shippers were asked to provide an indemnity of the sort UP's tariff requires, their recourse would be a rate reasonableness challenge, not a ban on indemnification. The Board has held squarely that the mere possibility that particular costs are covered by the transportation rate is not a valid objection to an ancillary charge or other tariff provision. The remedy, if there is one, is to challenge the overall reasonableness of the rate in light of the applicable tariff provisions. In *North American Freight Cars v. BNSF Railway Co.,* STB Docket No. 42060 (Sub-No. 1) (January 24, 2007) at 7, the Board considered and rejected the same argument made here: that the carrier's rates already covered the costs that would be recouped through a newly-established storage fee. The Board explained that "even if prior rates did fully incorporate the costs of indefinitely storing empty private cars (which Complainants have not shown to be the case), ... under the law, BNSF may raise the price for its services, as long as the total

amount paid is reasonable." *Id.* A challenge to indemnification on double recovery grounds is thus in substance a challenge to the rate for indemnified transportation, not a basis for an unreasonable practice claim.[23]

Opponents' "double-recovery" arguments prove too much. Every ancillary charges in connection with rail transportation could, in theory, be recouped through the freight rate itself, and every activity required by a tariff in theory saves the railroad costs that would otherwise have justified a higher rate. Yet the reasonableness of tariffs that impose such charges, or demand activity by the shipper, is well established. Among the countless examples:

- Storage charges for private cars have been upheld as encouraging efficiency and compensating for the use of carrier trackage, despite claims that such compensation is separately provided for by the transportation rate. *North American Freight Cars* at 7.
- Demurrage has consistently been upheld as encouraging efficiency and compensating carriers for expenses incurred, again despite the possibility that railroads could recoup the costs associated with car usage through their freight rates. *See, e.g., Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (served May 30, 2008) at 10-11.

---

[23] *See Kansas City Power & Light Co. v. Union Pacific R.R.*, STB Docket No. 42095 (served May 19, 2008) at 11 (rejecting unreasonable practice challenge to a volume cap as "essentially a challenge to a higher rate for service over a certain volume level. While the Board has broad authority over the reasonableness of a railroad's practices under 49 U.S.C. 10702(2), what is essentially a rate dispute should not be addressed via a claim of unreasonable practice. *See Union Pacific R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).").

- Railroads may impose surcharges to cover repair costs on a line even if the railroad is able to afford the repairs without the benefit of such revenue. *See, e.g., Decatur County Commissioners v. Central R.R. Co. of Indiana*, STB Finance Docket No. 33386 (served Sept. 29, 2000) at 18-19.

Given that the level of a railroad's overall revenues is a matter for adjudication in a rate reasonableness challenge, claims that indemnification is an unreasonable practice because it would yield a "double recovery" are in reality not about the level of recovery at all. They are instead about inappropriately restricting *the manner* in which railroads may protect against the risks associated with the transportation services they are required to provide. Forbidding indemnification would inappropriately preclude a railroad from asking the shipper to bear through indemnity a portion of the precise level of risk its shipping decisions entail, contrary to the general policy of ICCTA disfavoring cross subsidies. *See, e.g. North American Freight Cars* at 6. And forbidding indemnification would also preclude railroads from taking steps that spur shippers to make more efficient decisions so as to reduce the level of risk in the first place, contrary to regulatory policy that encourages such measures that create targeted incentives for efficient behavior. *See North American Freight Cars* at 6 (BNSF's new charges for empty private cars "not only ... compensate BNSF for the use of its track but also to encourage shippers to utilize their private cars more efficiently and to discourage them from holding empty private cars on BNSF's system for extended periods of time. Those objectives are reasonable.").

B. The Potential Availability of Insurance Does Not Make Indemnification Unnecessary or Inappropriate

Some commenters suggest that indemnification is inappropriate because railroads have already insured against the risks for which shippers would provide indemnification. *See*

Olin Opening at 10; Canexus Opening at 5. The potential availability of insurance for some portion of the indemnified liabilities does not mean that indemnification results in double recovery or a windfall for the railroad.

First, as previously shown in UP's comments, insurance does not fully cover potential liabilities associated with TIH releases. UP Opening, Duren V.S. at 5 & n.5. NS's experience is similar. Railroads have meaningful exposure to self-insured risk. NS does not have liability insurance covering the first $50 million of potential liabilities or liabilities exceeding certain caps that could easily be exceeded by a TIH-related catastrophe. Moreover, the insurance NS does have can be exhausted by other covered liabilities within the policy ranges. *See* Norfolk Southern Corp. Form 10-K for fiscal year ended December 31, 2011, at K14 (Exhibit 3 hereto).

Second, even if NS had insurance that covered every conceivable TIH-related liability, indemnification would still be justified. Insurance and third-party indemnities routinely and appropriately co-exist. Insurance would still be needed because indemnification would *not* cover UP's own negligence. Insurance also provides some degree of protection for other situations where the railroad could not collect from the indemnitor because of that party's limited financial resources. Conversely, no amount of insurance would accomplish the beneficial effects of an indemnity in giving shippers incentives to consider the "externality" risks of their decisions.

Third, even if fully-effective insurance were available for TIH-related risks, the premiums attributable to a specific shipper's TIH shipments likely would not be readily identifiable. If this is incorrect, and a shipper's indemnity *did* reduce the insurance premiums the railroad pays in a measurable way, that reduction in costs would be taken into account in

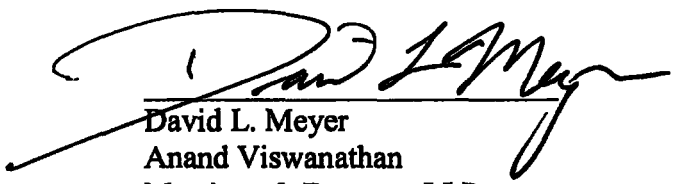
the rate reasonableness context, and thus would inevitably be taken into account in the railroad's own rate-setting determinations.

Finally, if shippers sincerely believe that insurance is a superior approach to indemnification, NS would be open to allowing them to avoid an indemnity by taking out insurance that named NS as the insured and fully covered liabilities arising from transportation of the shipper's TIH traffic. As the Board held in *Amtrak-Springfield Terminal*, one or the other approach is needed to compensate for the incremental risks imposed by the Board-imposed obligation to carry out the requested transportation. 3 S.T.B. at 161.

CONCLUSION

The opening evidence and argument in this proceeding strongly support the reasonableness of indemnification in the TIH context. Opponents understandably would prefer not to bear the risks associated with their shipping decisions, but that position is untenable and should be rejected. The Board should clarify that railroads may reasonably insist upon such an indemnity as one means of addressing the extraordinary risks associated with transporting TIH chemicals.

Respectfully Submitted,



James A. Hixon
John M. Scheib
David L. Coleman
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Anand Viswanathan
Morrison & Foerster, LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: March 12, 2012

CERTIFICATE OF SERVICE

I, Anand Viswanathan, certify that on this date a copy of the Reply Evidence and Argument of Norfolk Southern Railway Company, filed on March 12, 2012, was served by email or first-class mail, postage prepaid, on all parties of record in accord with the service list set forth in the Board's decision served January 23, 2012.

Anand Viswanathan

Dated: March 12, 2012

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

REPLY EVIDENCE AND COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 1

COUNCIL on FOREIGN RELATIONS

Rail Security and the Terrorist Threat

Author: Eben Kaplan
March 12, 2007

Introduction

High profile terrorist attacks on rail systems in Madrid, London, and Mumbai provide troubling illustration to persistent warnings that the U.S. public transportation system is a vulnerable target for terrorists. But passenger rail is not the only, and perhaps not even the gravest concern. Much of the 160,000 miles of railroad track in the United States transports freight, including highly toxic chemicals. These shipments often have minimal security, even though they pass through populated areas, endangering thousands of lives.

Passenger Rail

Each year Americans make more than 3.5 billion trips on intercity trains, commuter rails, and subways. On a given day in New York City, more people pass through Penn Station than all three major airports servicing the region combined. The abundance of passengers, combined with the need for easy access, makes securing passenger railways a daunting task. Absolute security can never be achieved, and experts caution against extreme security measures, which they say would disrupt how transportation systems function while offering no guarantee against attack.

In an attempt to balance security and accessibility, rail companies have taken measured precautions to help prevent attacks. These include random searches of passengers and baggage, increased presence of security officers and bomb-sniffing dogs, increased video surveillance, removal or hardening of trash cans so they cannot hide bombs, and encouraging passengers to report suspicious activity. But though these measures preserve passengers' easy access to trains, they would be unlikely to foil a determined terrorist cell.

In light of this inherent vulnerability, many rail companies have sought to bolster their ability to react to emergencies in order to minimize the impact of an attack. This includes emergency planning, hiring and training emergency personnel, and purchasing emergency equipment such as radios. By mitigating the potential impact of a terrorist attack, experts say, rail companies could discourage some terrorists from targeting them.

Improving Passenger Rail Security

Though security professionals see trains as some of the likeliest terrorist targets, **P.J. Crowley**, a homeland security expert at the Center for American Progress, explains: "On passenger rail, there's a limit to what can be done." Some experts believe existing precautions on most railroads already approach that limit, but Crowley suggests increasing police presence in stations and on trains could further diminish the risk of attack. The problem, he says, is that local governments usually don't have the money to sustain such a force.

In lieu of additional manpower, security experts suggest an element of randomness could help thwart terrorist plots by presenting a dynamic target. Frequent, unpredictable police presence and random searches—like those implemented on the New York City subway following the 2005 London bombings—have the potential to deter or disrupt an attack. Random searches avoid the civil liberties issues raised by profiling based on race, gender, or age. They also ensure that every passenger has a chance of being searched, dissuading notions that, for instance, female suicide bombers are less prone to security screening.

Some in Congress have become frustrated by the financial roadblocks in the way of increased security measures. House Homeland Security Committee Chairman Bennie Thompson (D-MS) has decried a system that sees nine dollars spent on aviation security for every penny spent on shoring

up railways, but many people disagree. "A commercial airliner has the capacity to kill 3,000 people," Homeland Security Secretary Michael Chertoff once told reporters, "A bomb in a subway car may kill thirty people. When you start to think about your priorities, you're going to think about making sure you don't have a catastrophic thing first."

Some security analysts argue the best way to ensure the safety of American railways, as well as the myriad other easy targets in the country, is to focus efforts on counterterrorism investigations and intelligence operations. "The best way to prevent a terrorist attack is to stop terrorists **before they can strike**," writes James Jay Carafano in a recent Heritage Foundation memo. Indeed, perhaps the most serious plot against an American passenger train—a plot to bomb the Herald Square subway station—was foiled by a yearlong undercover operation by the New York Police Department.

Freight Rail

Many of the tracks that carry passenger trains run parallel to those carrying freight shipments throughout the United States, meaning rail cargoes often travel along the same heavily populated corridors. Much of the freight presents little danger to people living near the tracks, but some does—particularly certain industrial chemicals. The deadliest of these chemicals are almost identical to those used as weapons on the battlefields of World War I, and in 2005 former White House Deputy Homeland Security Adviser Richard Falkenrath told the Senate these chemicals pose "the single greatest danger of a potential terrorist attack in our country today."

Hazardous chemicals travel on railcars in ninety-ton pressurized tanks. What little security exists along their route tends to be lax, and at times tanks sit unmonitored in rail yards for days at a time. Should one of these tanks rupture—either from a terrorist attack or an accident—the results could be catastrophic. Fred Millar, a rail security lobbyist and former member of the Washington, D.C. local Emergency Planning Committee, likens the shipment of chemicals through America's biggest cities to "pre-positioning weapons of mass destruction."

Dr. Jay Boris of the Naval Research Laboratory in Washington, D.C., told the City Council that the worst-case scenario for that city could result in up to a hundred thousand fatalities. A video from his laboratory simulates the **spread of a toxic gas** cloud over three major U.S. cities. A more

conservative 2004 Homeland Security Council **report (PDF)** estimated that a ruptured chlorine gas tank in a densely populated area could kill as many as 17,500 people and injure an additional 10,000. In addition to the dead and wounded, tens of thousands would have to evacuate, causing widespread panic. Nancy L. Wilson, the **Association of American Railroads'** vice president for security, calls Boris' projection "pure fearmongering" and suggests the Homeland Security Council model would require perfect conditions. Wilson, who speaks for the rail industry, says a more plausible scenario might result in hundreds dead, not thousands.

Securing Rail Freight

The Federal Railroad Administration (FRA) has 415 inspectors who ensure that rail freight conforms to **federal regulations (PDF)** for transporting hazardous materials. Those regulations require rail carriers to implement security plans, including special training for their employees. Carl Prine, an investigative reporter for the *Pittsburgh Tribune-Review*, says FRA audits since 2003 show many companies have yet to conform. In researching his own report, Prine gained **unfettered access** to rail cars holding toxic chemicals in several U.S. cities.

The Department of Homeland Security (DHS) and the Department of Transportation (DOT) offer a list of **voluntary security practices** for hazmat carriers, including criminal background checks for employees, regular training drills, and designating a liaison to government emergency response agencies. Many believe these measures should be mandatory; Senator Frank Lautenberg (D-NJ) described the federal government's approach to the issue as merely **"window dressing" (*WashPost*)**. The rail industry says it implemented most of these measures before the government issued its recommendations. "We have the best safety record of any transportation method in the United States," Wilson says. "[After 9/11,] we identified our vulnerabilities and made significant changes to our operations."

One proposed measure championed by Fred Millar and others calls for rerouting hazardous rail cargo so it bypasses densely populated areas. In 2005, the District of Columbia became the first of several cities to enact legislation banning rail carriers from transporting hazardous chemicals through the city's center. That ban has yet to take effect due to an unresolved legal appeal by CSX Transportation, the primary rail carrier in Washington. Rail companies argue that rerouting would prove costly, though experts note the cargoes in question account for less than 1 percent of rail

freight. However, major cities often produce or consume these chemicals, in which case rerouting is not an option.

Though rerouting may be appropriate in some circumstances, **Stephen E. Flynn**, the Council on Foreign Relations Jeanne J. Kirkpatrick senior fellow for national security studies, explains, "When you do start diverting, you are talking about delays and increased costs. Some of that's worth it, but what's important to remember is that some of these chemicals are very important to our daily lives." For example, oil refineries and water treatment plants use dangerous chemicals to produce the gasoline and drinking water Americans rely on.

Flynn says rail companies need to improve their communication with local officials in places through which they ship dangerous chemicals. "Fire chiefs don't want to show up and have to guess what they're confronting." This is among the voluntary measures recommended by DHS and DOT, but Flynn says the rail industry has resisted because effectively sharing this information can prove costly. Not so, argues Wilson. The rail industry provides lists of the top twenty five most dangerous chemicals that travel through a given community over the course of a year, she says. Companies could easily provide car-by-car information on a daily basis, but local officials have no interest because they fear becoming overwhelmed with information.

Wilson says rail carriers have taken other measures to ensure local officials have adequate information. "The railroad industry, often working with chemical companies, trains more than twenty thousand first responders [about chemical hazards]," she says. The rail industry also has its own intelligence center, which examines classified government reports for potential threats to railways, and can quickly communicate with the appropriate rail workers when danger is imminent.

Inherently Safer Technologies

Experts agree that any solution to rail freight security must address the hazardous chemicals themselves. "In my thinking," Crowley says, "freight rail, for all intents and purposes, is an element of chemical security. You can't separate the two." Reducing the need for some of the most dangerous chemicals reduces the risk of their release, either by accident or sabotage. Some chemical companies have begun opting for less hazardous alternative chemicals: At a nominal

difference in cost, water treatment facilities can use liquid bleach in place of chlorine and refineries can replace hydrofluoric acid with the less lethal sulfuric acid. Inherently safer technologies (ISTs), as they are called, play a major role in efforts to secure **U.S. chemical facilities** as well.

Many companies and municipalities make these changes on their own, but the federal government has done little to encourage them. "These are not railroad issues," Wilson says, "The government needs to step up to the plate." Crowley says requiring implementation of ISTs would not work, but "government can use carrots and sticks to force the private sector to adapt."

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

REPLY EVIDENCE AND COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 2

BBC NEWS

US & CANADA

6 May 2011 Last updated at 07:22 ET

Osama Bin Laden 'planned 9/11 anniversary train attack'

COMMENTS (265)

Documents found at Osama Bin Laden's Pakistan home suggest he was planning attacks on the US, including on the 10th anniversary of 9/11, reports say.

One plan was to target a US rail route, US officials revealed, although no imminent threat was detected.

Officials are examining computers, DVDs, hard-drives and documents seized from the Abbottabad home where Bin Laden may have hidden for six years.

Several rallies are expected across Pakistan in protest at Monday's raid.

Many Pakistanis are angry at what they see as a US infringement of their country's sovereignty.

They are also critical of the government for allowing the commando operation to happen, although officials deny they were told about it.

Around 1,000 people had already gathered in central Abbottabad following Friday prayers, the AFP news agency reported.

They were setting fire to tyres, blocking a main road and shouting "Down, down USA!" and "Terrorist, terrorist, USA terrorist".

Anti-American sentiment appeared to be high at a similar protest in the south-western city of Quetta, the capital of Baluchistan province.

Later on Friday, US President Barack Obama is due to meet some of the troops involved in the helicopter-borne assault.

He will hold private meetings on Friday at Fort Campbell, Kentucky, with at least some of the Navy Seals who took part in the raid.

Derail plan

Information about the apparent plans unearthed in Pakistan was contained in a joint FBI and Homeland Security bulletin, the Associated Press news agency said.

The bulletin, circulated to law enforcement officials, said the idea to tamper with an unspecified US railway track was found in handwritten notes taken from Bin Laden's compound.

According to the bulletin al-Qaeda operatives planned to derail a train so that it would plunge into a valley, or from a bridge, AP reported.

"While it is clear that there was some level of planning for this type of operation in February 2010, we have no recent information to indicate an active ongoing plot to target transportation and no information on possible locations or specific targets," the warning read.

One intelligence official said the notes revealed the ambition to hit the US with large-scale attacks in major cities and on key dates such as anniversaries and holidays.

One unnamed US official **told the New York Times** the documents revealed that Bin Laden was not merely a figurehead for al-Qaeda sympathisers worldwide.

"He continued to plot and plan, to come up with ideas about targets, and to communicate those ideas to other senior [al-]Qaeda leaders," the newspaper quotes the official as saying.

Contradictions

Meanwhile, further details have emerged about Bin Laden's life in the Abbottabad compound and the exact sequence of events that lead to his death.

A senior Pakistani military official said one of Bin Laden's wives told investigators she had been living in the compound for five years, along with her husband.

New reports of the raid appear to contradict earlier information about the raid.

White House counter-terrorism adviser John Brennan had originally suggested that Bin Laden was among those who was armed within the compound.

Early accounts of Sunday night's raid had suggested a lengthy exchange of fire throughout the 40-minute operation.

But US officials now say that only one person fired on the US special forces.

He is believed to have been Bin Laden's courier, Abu Ahmed al-Kuwaiti, who was killed at the start of the raid.

Critics have raised concerns about the legality of the operation after the US revised its account to acknowledge Bin Laden was unarmed when shot dead.

However, the US has maintained that Bin Laden was a lawful military target whose killing was "an act of national self-defence".

The US raid against Osama Bin Laden was launched after months of CIA surveillance from a safe house in Abbottabad, **the Washington Post reported on Friday**.

Citing unnamed officials, the newspaper said the CIA's operation used satellite imagery and attempted to record voices inside the compound, but was stood down before the military operation was eventually launched.

Pakistan's army has acknowledged "shortcomings" in its own efforts to find Osama Bin Laden but has also threatened to review ties with the US military if it carries out any further unilateral operations.

Your comments (265)

Comments

This entry is now closed for comments

Editors' Picks All Comments (265)

225.priyasj
6TH MAY 2011 - 15:28 +1
Regarding releasing Bin Laden's photo,we don't want to see it. We are happy with the fact that one terrorist is less in the world. If anyone wanted to see Osama's photo as proof of his death,Al-queda had confirmed the death,What more is needed? Why waste our time, money and energy on a terrorist? Why should he enjoy any kind of justice, when millions of victims of terrorism never got any justice?

192.Justin
6TH MAY 2011 - 14:25 -6
Tooth for a tooth and eye for an eye? Fair enough! Bin laden killed many people and I guess he desereved to die. But what started this war in the first place, believe me it was not 9/11. Bin laden didnt just wake up one day and decide to hate the US. Think about what must have happened all the years before 9/11. The US is not at all that innocent in all this. Tooth for a tooth,eye for an eye?

147.coastwalker
6TH MAY 2011 - 13:00 +13
Any rational person should be happy that this mass murderer has been killed. Not only did he instigate many atrocities against civilian people but he in part is also responsible for the less than glorious invasion of Iraq and our increasingly security bound society. Oddly it also turned out that this hypocritical killers own base was in a peaceful garden city living with his family.

129.Gavin
6TH MAY 2011 - 12:28 +1
irrespective of the rights and wrongs, Americans do not seem to realise that Osama was not the leader of a rigid organisation, but that that fluidic organisations idealogy is still very much intact, along with its followers. All

the US have done is exactly what the Egyptian government did under Nassar when they hung S Qutb in the 1960's - they've made him a martyr.

78.Jim
6TH MAY 2011 - 11:01 **+21**
This is just more trying to justify why he was executed without a trial. It does not matter! There is no way he could have been put on trial. The cost in human life and suffering would have been too high. The outcome of a trial is obvious too. The US did not follow due process and they were right not to in the circumstances.

Comments 5 of 8 **Show More**

Sign in or register to comment and rate comments.
All posts are reactively-moderated and must obey the house rules.

More US & Canada stories

US massacre soldier 'acted alone'
[/news/world-asia-17343437]
An American soldier accused of killing 16 Afghans acted alone, US officials say, insisting that it was an isolated incident.
Canada smoke firms sued for $27bn
[/news/world-us-canada-17342580]
Panama arrests Canada Hell's Angel suspect
[/news/world-us-canada-17344691]

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

REPLY EVIDENCE AND COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY

EXHIBIT 3

10-K 1 nsc11.htm

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549
FORM 10-K

(X) ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 for the fiscal year ended **DECEMBER 31, 2011**

( ) TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 for the transition period from _____ to_____

Commission file number 1-8339

NORFOLK SOUTHERN CORPORATION
(Exact name of registrant as specified in its charter)

Virginia	**52-1188014**
(State or other jurisdiction of incorporation)	(IRS Employer Identification No.)
Three Commercial Place	
Norfolk, Virginia	**23510-2191**
(Address of principal executive offices)	Zip Code
Registrant's telephone number, including area code:	**(757) 629-2680**

Securities registered pursuant to Section 12(b) of the Act:

Title of each Class	Name of each exchange on which registered
Norfolk Southern Corporation	
Common Stock (Par Value $1.00)	**New York Stock Exchange**

Securities registered pursuant to Section 12(g) of the Act: NONE

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes (X) No ( )

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ( ) No (X)

Indicate by check mark whether the registrant: (1) has filed all reports required to be filed by Section 13 or Section 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes (X) No ( )

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulations S-T during the preceding 12 months. Yes (X) No ( )

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of the Form 10-K or any amendment to this Form 10-K. ( )

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer or smaller reporting company. See definitions of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.
Large accelerated filer (X) Accelerated filer ( ) Non-accelerated filer ( ) Smaller reporting company ( )

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ( ) No (X)

The aggregate market value of the voting common equity held by non-affiliates as of June 30, 2011, was $25,988,654,887 (based on the closing price as quoted on the New York Stock Exchange on that date).

The number of shares outstanding of each of the registrant's classes of common stock, as of January 31, 2012: 330,141,306 (excluding 20,320,777 shares held by the registrant's consolidated subsidiaries).

DOCUMENTS INCORPORATED BY REFERENCE:

Portions of the Registrant's definitive proxy statements to be filed electronically pursuant to Regulation 14A not later than 120 days after the end of the fiscal year, are incorporated herein by reference in Part III.

NS relies on technology and technology improvements in its business operations. If NS experiences significant disruption or failure of one or more of its information technology systems, including computer hardware, software, and communications equipment, NS could experience a service interruption, security breach, or other operational difficulties, which could have a material adverse impact on its results of operations, financial condition, and liquidity in a particular year or quarter. Additionally, if NS does not have sufficient capital to acquire new technology or it is unable to implement new technology, NS may suffer a competitive disadvantage within the rail industry and with companies providing other modes of transportation service, which could have a material adverse effect on its financial position, results of operations, or liquidity in a particular year or quarter.

The vast majority of NS employees belong to labor unions, and labor agreements, strikes, or work stoppages could adversely affect its operations. More than 80% of NS railroad employees are covered by collective bargaining agreements with various labor unions. If unionized workers were to engage in a strike, work stoppage, or other slowdown, NS could experience a significant disruption of its operations. Additionally, future national labor agreements, or renegotiation of labor agreements or provisions of labor agreements, could significantly increase NS' costs for healthcare, wages, and other benefits. Any of these factors could have a material adverse impact on NS' financial position, results of operations, or liquidity in a particular year or quarter.

NS may be subject to various claims and lawsuits that could result in significant expenditures. The nature of NS' business exposes it to the potential for various claims and litigation related to labor and employment, personal injury, commercial disputes, freight loss and other property damage, and other matters. Job-related personal injury and occupational claims are subject to the Federal Employer's Liability Act (FELA), which is applicable only to railroads. FELA's fault-based tort system produces results that are unpredictable and inconsistent as compared with a no-fault worker's compensation system. The variability inherent in this system could result in actual costs being very different from the liability recorded.

Any material changes to current litigation trends or a catastrophic rail accident involving any or all of freight loss or property damage, personal injury, and environmental liability could have a material adverse effect on NS' operating results, financial condition, and liquidity to the extent not covered by insurance. NS has obtained insurance for potential losses for third-party liability and first-party property damages. Specified levels of risk are retained on a self-insurance basis (currently up to $50 million and above $1 billion per occurrence for bodily injury and property damage to third parties and up to $25 million and above $175 million per occurrence for property owned by NS or in its care, custody, or control). Insurance is available from a limited number of insurers and may not continue to be available or, if available, may not be obtainable on terms acceptable to NS.

Severe weather could result in significant business interruptions and expenditures. Severe weather conditions and other natural phenomena, including hurricanes, floods, fires, and earthquakes, may cause significant business interruptions and result in increased costs, increased liabilities, and decreased revenues, which could have an adverse effect on NS' financial position, results of operations, or liquidity in a particular year or quarter.

Unpredictability of demand for rail services resulting in the unavailability of qualified personnel could adversely affect NS' operational efficiency and ability to meet demand. Workforce demographics, training requirements, and the availability of qualified personnel, particularly engineers and trainmen, could each have a negative impact on NS' ability to meet demand for rail service. Unpredictable increases in demand for rail services may exacerbate such risks, which could have a negative impact on NS' operational efficiency and otherwise have a material adverse effect on its financial position, results of operations, or liquidity in a particular year or quarter.

NS may be affected by supply constraints resulting from disruptions in the fuel markets or the nature of some of its supplier markets. NS consumed about 475 million gallons of diesel fuel in 2011. Fuel availability could be affected by any limitation in the fuel supply or by any imposition of mandatory allocation or rationing regulations. If a severe fuel supply shortage arose from production curtailments, increased demand in existing or emerging foreign markets, disruption of oil imports, disruption of domestic refinery production, damage to refinery or pipeline infrastructure, political unrest, war or other factors, NS' financial position, results of operations, or liquidity in a particular year or quarter could be materially adversely affected. Also, such an event would impact NS as well as its customers and other transportation companies.